U.S. Department of Labor

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Issue Date: 12 January 2006

Case No.: 2004-LHC-01473

OWCP No: 02-132327

In the Matter of

FRANCESCO CAMPIONE
Claimant

v.

P&O PORTS NORTH AMERICA
Employer

Appearances:

Jorden N. Pedersen, Jr., Esquire
For Claimant

Christopher J. Field, Esquire
For Employer

Before: RALPH A. ROMANO
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act ("The Act"), 33 U.S.C. § 901 *et seq*.

This matter was transferred to the Office of Administrative Law Judges on April 5, 2004. The hearing was originally scheduled for October 20, 2004 and after two continuances was eventually held on January 24, 2005, in New York, New York.[1] At that time, the parties were given the opportunity to present evidence and make oral argument.[2] Following the hearing, the

[1] The transcript of the hearing consists of 65 pages and will be cited as "Tr. at --."

[2] Claimant submitted Exhibits 1 through 12 at the hearing, and Exhibit 13 was identified but was not submitted into evidence at that time. Following the hearing, Exhibits 13 through 22 were submitted into evidence and each is herewith admitted over Employer's objection to Exhibit 15. Claimant's exhibits will be referred to herein as "CX-1" through "CX-22." CX-13

record was to remain open for the submission of additional evidence and post-hearing briefs. On August 18, 2005, after briefs had been filed, Employer motioned for decision in this matter to be held for 30 days in order for newly discovered evidence to be submitted. Over Claimant's objection, I allowed such submission of evidence and also allowed Claimant 30 days in which to respond thereto. Such response was received on October 13, 2005.

I. STIPULATIONS AND ISSUES

The parties have entered into and I find the record supports the following stipulations:

1. Claimant was involved in an accident on October 30, 2002 while working for Employer.

2. The parties are subject to the Act.

3. An employer/employee relationship existed at the time of injury.

4. The injury to the lower right extremity arose in the course and scope of employment.

5. Employer was timely notified of the injury.

6. Notice of Controversion was timely filed.

7. Disability resulted from the injury.

8. Medical benefits have been paid under § 7 of the Act.

9. Temporary total disability benefits were paid from October 31, 2002 to August 17, 2004.

10. Benefits were paid for 93.86 weeks at a rate of $588.38.

11. Claimant was also paid for a 17 percent scheduled loss of use of the right leg.[3]

(Tr. at 5-6).

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through CX-16 were marked for identification when received. I have marked the deposition transcripts in the following way: Dr. El-Dakkak—CX-17, Dr. Steinway—CX-18, Dr. Kincaid—CX-19, Dr. Weinberg—CX-20, Dr. Vichinsky—CX-21, Dr. Lewis—CX-22. Employer's Exhibits 1 through 15 were received into evidence at the formal hearing. Following the hearing, Employer submitted Exhibits 16 through 22, which are herewith admitted. Employer's exhibits will be referred to as "EX-1" through "EX-22."

[3] Claimant was paid for 48.96 weeks, totaling $28,807.08 for this scheduled loss, but the amount was reduced, as Employer felt it was owed a credit for a previous overpayment of compensation.

The following issues have been presented for resolution:

1. whether Claimant's alleged back and psychological injuries are causally related to the October 30, 2002 injury that occurred at Employer's place of business;

2. the nature and extent of Claimant's disability;

3. Claimant's average weekly wage ("AWW");

4. whether Employer is obligated to pay any outstanding medical expenses.

II. SUMMARY OF THE EVIDENCE

Claimant was the only witness to give testimony at the formal hearing in this matter. However, he also submitted the deposition testimony of Drs. Jeffrey Lewis (CX-22), Richard Weinberg (CX-20), Mitchell Steinway (CX-18), Neal Vichinsky (CX-21), and Selim El-Dakkak ("Dr. Dakkak") (CX-17). In addition, Claimant submitted two MRI reports of the right knee (CX-1; CX-11), an operative report regarding the right knee (CX-2), a CT scan of the lumbar spine (CX-3) and the reports or records of several physicians (CX-4 through CX-10; CX-12; CX-15; CX-16). The vocational evidence submitted by Claimant includes the deposition testimony of Dr. Charles Kincaid (CX-19), Dr. Kincaid's report (CX-14) and Claimant's earning statements (CX-13).

Employer submitted the deposition testimony of Claimant (EX-20) as well as the deposition testimony of the following experts: Dr. Leon Sultan (EX-18), Dr. Nancy Gallina (EX-19) and Ms. Sharon Levine (EX-17). In addition, Employer submitted Forms LS-202, 206, 207 and 208 (EX-1 through EX-4). The reports of the following doctors were also submitted by Employer and accepted into evidence: Dr. Sultan (EX-5, EX-6, EX-10, EX-11 and EX-16), Dr. Oppenheim (EX-7 & EX-9) and Dr. Gallina (EX-8). The vocational evidence submitted by Employer includes the reports of Kinematic Consultants (EX-12), Smolkin Vocational Services (EX-14) and SML Rehabilitation Consultants (EX-15), as well as correspondence from P&O Ports to Claimant (EX-13) and a report of Claimant's wages (EX-21).

A. Claimant's Testimony

Claimant testified on his own behalf at the formal hearing. He began working as a longshoreman in May or June of 2002. (Tr. at 12). He did not work for any particular stevedore but testified that he worked for Employer more than any of the others. Claimant's duties as a longshoreman included loading ships with a hi-lo, performing knockdown if the skids were too high to fit into the ship and doing "drag-out."[4] (Tr. at 13). He also drove cars onto car ships, requiring him to climb up to seven flights of stairs. (Tr. at 14). His work for one stevedore

[4] Claimant explained this as a process in which "You hook a chain, you hand the chains to the truck driver and attach it to the hi-lo when you would drag it out, you know, to unload the truck." (Tr. at 13).

required warehouse type work, including heavy lifting. In fact, the day before his accident Claimant worked for this particular Stevedore and handled 500 bags of Brazilian nuts weighing 80 pounds each. (Tr. at 13-14; 16). While working for Employer, Claimant worked on car ships during the week and then worked in the passenger terminal on the weekends, where he unloaded trucks, loaded the ship, performed knockdown, did drag-out and drove a hi-lo. (Tr. at 16-17).

Claimant was involved in an accident on October 30, 2002 while working for Employer. According to his testimony, Claimant felt fine on the day prior, having no physical complaints about any part of his body. (Tr. at 18). On the day of the accident, Claimant was attempting to get back on his hi-lo when his foot slipped out of the holding haul and he fell approximately 4 feet, hurting his right ankle and knee before landing on his back. (Tr. at 19-20). He did not complete his shift that day and sought medical treatment the following morning. (Tr. at 21).

Claimant saw Dr. Vichinsky, "a neighborhood foot doctor," on October 31, 2002. (Tr. at 21). Claimant next went to see Dr. Dakkak, an orthopedic surgeon, at the advice of a friend. The first visit occurred a couple weeks after the accident. (Tr. at 23). Dr. Dakkak treated Claimant for his right knee and surgery was eventually performed on Claimant's knee in November of 2003. (Tr. at 25). Claimant also saw Dr. Weinberg, a chiropractor, beginning in November of 2002. (Tr. at 26). According to his testimony, Claimant initially began experiencing the back pain approximately 3 to 4 weeks after the accident, when he was "getting back on [his] feet, and…walking around," after his ankle had healed enough for him to stand on it again. (Tr. at 26). Claimant was also treated by Dr. Lewis, a psychologist, due to his verbal abuse of his family and "fits of anger." (Tr. at 31).

Claimant testified that he is willing to undergo the second surgery to his knee recommended by Dr. Dakkak. (Tr. at 38). Dr. Dakkak has also opined that there may be a surgery that Claimant can have on his back, and although Claimant was willing to undergo such surgery, Dr. Dakkak stated he did not advise it. (Tr. at 38).

At the time of the hearing, Claimant was complaining of an inability to walk more than several blocks and constant pain in his back and legs. (Tr. at 32). In addition, his right leg often gives out, causing him to fall. (Tr. at 32-33). The back pain and pain that radiates down his right leg occur every day and especially at nighttime, making it difficult for Claimant to fall asleep. His right leg also twitches. His knee locks up on him several times per month and this had occurred approximately 10 days prior to the hearing, causing him to fall backwards and injure his right shoulder, for which he was seeing Dr. Dakkak. (Tr. at 34). He has used a cane since November of 2002 for stability. (Tr. at 39). Claimant testified that he is able to stand for about 10 or 15 minutes before having to sit down or lean on something for support. (Tr. at 34-35). He cannot lift or carry heavy objects because of the injuries to his leg and back. (Tr. at 35).

Claimant testified that he received a letter offering him the opportunity to return to work as a hi-low driver in Employer's passenger terminal. (Tr. at 35). In September of 2004, Claimant spoke with Employer's representative, Mr. Jones, regarding the position. (Tr. at 35). Claimant wanted to know what concessions were going to be made and was told only that he would be hired as a hi-lo driver in the passenger terminal and when he was ordered to work elsewhere, Employer could not control the conditions of any such employment. (Tr. at 36).

Claimant admitted the letter noted that Employer was willing to accommodate any restriction Claimant might have. Claimant has not looked for work since August of 2004. (Tr. at 49).

Claimant also testified that he notified Employer's consultant, Dr. Sultan, of the back pain. In Claimant's words:

> Dr. Sultan asked me on that day, am I putting a claim in for my back and why am I seeing Dr. Weinberg. And I said to Dr. Sultan, I'm seeing Dr. Weinberg, he's giving me treatment on my back which is making me feel better and giving me more ability to try to walk and not to have pain. And as far as knowing what was wrong with my back is I don't know, we need tests to be done. And he had told me at that time he would authorize all tests required to get me taken care of.

(Tr. at 44).

Claimant's deposition testimony is significant only in that he testified that he had no medical problems prior to October 30, 2002. (EX-20 at 11). When asked if he'd ever been hospitalized, he admitted to having rotator cuff surgery in 1985 following an automobile accident. (EX-20 at 12). He testified further that other than the 1985 car accident, he was not involved in any automobile accidents or "[a]ny other accidents of any sort." (EX-20 at 13). He also specifically denied ever having seen a chiropractor prior to sustaining this injury. (EX-20 at 13).

B. Medical Evidence

Dr. Vichinsky

Dr. Vichinsky is Board-certified in general and surgical podiatry as well as wound care and pain management. (CX-21 at 4-5). He was consulted by Claimant on October 31, 2002, at which time Claimant stated he injured his right foot when he slipped off a hi-lo. (CX-21 at 5). Dr. Vichinsky examined Claimant and prescribed an armored boot cast, the use of crutches and an anti-inflammatory. (CX-21 at 6). Claimant was ordered not to put weight on the right foot. (CX-21 at 6).

Reevaluation of Claimant's condition on November 5 revealed Claimant was having difficulty with the armoured boot due to extensive swelling, so Dr. Vichinsky used "a little boot cast with compression in conjunction with the crutches and limited him to non weight bearing." (CX-21 at 7). By the time of Claimant's November 12 visit, the swelling had diminished and Claimant was switched back to the armored boot with the use of crutches. Claimant was ordered to remain non-ambulatory. (CX-21 at 8). As of December 17, Claimant had diminished pain in his right foot but increased pain in his knee and back. He was switched from crutches to his cane and was referred to a medical doctor for the knee pain. (CX-21 at 9).

Claimant's last visit with Dr. Vichinsky was on January 6, 2003, at which time "the knee and back still had residual problems exacerbated by obesity and some compensation" and

Claimant had "developed a plantar fascia strain which is the plantar tissue on the bottom of the foot." (CX-21 at 9).

In Dr. Vichinsky's opinion, the ankle problem could be permanent in nature "depending how much distention he has from the ligamentous damage." (CX-21 at 11). The ankle injury, according to Dr. Vichinsky, was definitely related to the October 30, 2002 accident. (CX-21 at 11).

A letter addressed to Employer and signed by Dr. Vichinsky indicates that Claimant was referred to an orthopedist for knee pain secondary to Claimant's injury. The letter also requested authorization for orthotics for Claimant. (CX-4).

CX-15 is an undated report signed by Dr. Vichinsky. The report indicates that an antalgic gait manifested in lower back pain.

Dr. Dakkak

Dr. Dakkak is a Board-certified orthopedic surgeon. (CX-17 at 3). On physical exam on November 21, 2002, Dr. Dakkak found swelling and tenderness around Claimant's right knee joint. (CX-17 at 7-8). Based on these findings and range of motion testing, Dr. Dakkak diagnosed a torn meniscus. He opined that Claimant could not return to work as a longshoreman and recommended therapy, medication and an MRI. (CX-17 at 8).

Dr. Dakkak again saw claimant on December 22, 2002, at which time Claimant was still experiencing pain and swelling in his knee as well as pain in the ankle and lower back. (CX-17 at 8). An MRI had not been authorized prior to the December 22 visit. According to Dr. Dakkak's testimony, Claimant was still complaining of pain in his knee and his back on January 26, 2003, on which date Claimant reported being seen by a chiropractor. (CX-17 at 9). However, Dr. Dakkak made no additional treatment recommendations, as he was still waiting authorization for an MRI of the knee. (CX-17 at 9). When the MRI was finally performed on February 5, 2003, it showed "vertical full thickness tear…of the median meniscus," "chondral injury to the femoral chondral with fusion of the knee" and the lateral meniscus was also torn. (CX-17 at 10-11). Dr. Dakkak recommended surgery based on these findings. (CX-17 at 11).

Claimant's next visit with Dr. Dakkak was on February 24, 2003, at which time Dr. Dakkak reported that Claimant needed surgery and would have traumatic osteoarthritis in the right knee. (CX-17 at 11-12). During the April 7 visit, Claimant complained that the knee was starting to lock and by the May 29, 2003 visit, it was beginning to give out. (CX-17 at 12-13). On July 17, 2003, surgery was scheduled for September 2 or 3, however, it was not actually performed until November 4, 2003. (CX-17 at 14). Following surgery, Claimant underwent physical therapy. (CX- at 17). In addition, another MRI of the knee was done on October 12, 2004, which revealed crushing type injuries that cannot be repaired. (CX- at 19-20). However, Dr. Dakkak recommended surgery which will be needed "once a year to clean his knee from inside." (CX- at 20).

Although Dr. Dakkak did not treat Claimant for his back, he did record Claimant's complaints of pain and indicated that a CT scan showed a herniated disc at L5-S1 and bulging discs at L3,4 and 5. (CX-17 at 16-17). He also opined that the October 2002 accident was a contributing factor in causing Claimant's back injury. (CX-17 at 24). According to Dr. Dakkak, Claimant's back injury can be caused by twisting and an antalgic gait can aggravate the condition. (CX-17 at 25).

On cross-examination, Dr. Dakkak indicated that Claimant is capable of doing work other than "the heavy labor of a longshoreman." (CX-17 at 26). Dr. Dakkak opined that Claimant requires additional surgery but his condition is permanent in nature. (CX-17 at 22). He also indicated that Claimant's knee may give out at anytime. (CX-17 at 23). Dr. Dakkak found Claimant unfit to return to his usual employment as a longshoreman and opined it was unsafe for Claimant to drive a forklift due to the instability of his knee. (CX-17 at 23). He also opined that Claimant is unable to kneel. (CX-17 at 15).

Dr. Weinberg

Dr. Weinberg is a licensed chiropractor. (CX-20 at 3). He first saw claimant on November 29, 2002. (CX- 20 at 4). Claimant told Dr. Weinberg that he injured his back while at work, when he slipped off his hi-lo. (CX-20 at 4). Upon examination, Dr. Weinberg found a decrease in flexion in all ranges of motion, positive orthopedic tests, muscle spasms and disc tenderness at L5-S1 among other positive findings. (CX-20 at 6). Due to a positive straight leg raising test (Lasegue test) and positive Dejines Test, Dr. Weinberg opined that Claimant was suffering from a lumbar disc problem and referred him for an MRI. (CX-20 at 6-7). Because Employer would not authorize the MRI, Claimant eventually had a CAT scan done, which he paid for himself. (CX-20 at 7-8). In Dr. Weinberg's opinion, the CAT scan revealed bulging discs at L3-L4 and L4-L5, a herniated disc at L5-S1 and stenosis of the neural foramina at L3-S1. (CX-20 at 8).

Dr. Weinberg initially saw Claimant 3 to 5 times per week and treatment consisted of muscle stimulation, light spinal manipulation and stretching and exercises. (CX-20 at 9). By the time of Dr. Weinberg's deposition, he was only seeing Claimant about once a week. (CX-20 at 9).

Dr. Weinberg diagnosed Claimant with lumbosacral radicular syndrome, as a result of the L5-S1 herniated disc, which was confirmed by the EMG. (CX-20 at 9-10). In Dr. Weinberg's opinion, Claimant's complaints are "[t]otally consistent" with the objective findings. (CX-20 at 10). Dr. Weinberg also opined that Claimant's back condition is permanent and Claimant is totally disabled from all employment. (CX-20 at 12). In addition, Dr. Weinberg testified that Claimant's back condition is a direct result of the October 30, 2002 accident. (CX-20 at 13).

On cross-examination, Dr. Weinberg admitted that he had seen Claimant in 1999 and 2000 for severe neck pain. However, he sent Claimant for an MRI back then which was normal. (CX-20 at 14). He was treated periodically for low back pain, but according to Dr. Weinberg's testimony, that treatment was a result of times where Claimant worked too hard and had "a little back sprain." (CX-20 at 14).

At the time of Dr. Weinberg's deposition, he was treating Claimant for subluxation in the lower back and the herniated disc. (CX-20 at 16). Spinal manipulation was used to treat the subluxation. (CX-20 at 17). He had previously used muscle stimulation to treat the muscle spasm in Claimant's leg. (CX-20 at 21).

Dr. Weinberg testified that Employer was contacted either the day Claimant was first seen in relation to his work-place accident or the day after. (CX-20 at 15). However, Employer would not acknowledge that Claimant's back injury was related to that accident and so Dr. Weinberg never sent Employer a report detailing the treatment he rendered. (CX-20 at 15-16).

Dr. Steinway

Dr. Steinway is a Board-certified orthopedic surgeon. (CX-18 at 3). He examined Claimant on June 4, 2005. (CX- at 4). At that time, Claimant indicated he suffered an accident while working as a longshoreman and injured his right ankle, right knee and lower back. (CX-18 at 4). Claimant complained of locking and swelling of the right knee and the right knee giving way, in addition to depression, low back pain radiating through the right leg and pain along the lateral side of the right ankle. (CX-18 at 6-7).

According to Dr. Steinway, the results of his examination "did not correlate exactly with an MRI finding of L5-S1 disc herniation, especially with his complaints mostly right-sided." However, Dr. Steinway went on to explain that "someone can have a pathology central or left-sided and have more complaints on the right side or on the side where the pathology is, it's variable." (CX-18 at 10). Upon observing Claimant's gait pattern, Dr. Steinway noted limping consistent with the pain Claimant was experiencing on the right side and "difficulty in heel and toe standing." (CX-18 at 14). Dr. Steinway also observed decreased reaction to light touch, and testified at his deposition that these findings are consistent with nerve root irritation at L5 and S1. (CX-18 at 15).

Dr. Steinway reviewed the MRI of Claimant's knee taken on October 12, 2004, and he noted the patella was subluxed at least 30 percent laterally. (CX-18 at 13). He opined that the MRI was also consistent with the finding of nerve root irritation at L5-S1 as indicated by the EMG and his own findings on physical examination. (CX-18 at 15-16).

Dr. Steinway diagnosed patellar subluxation of the right knee and right lumbar radiculopathy at the L5-S1 level. (CX-18 at 16). Dr. Steinway testified that Claimant is unable to return to his pre-injury employment and is unable to drive a hi-lo due to his ankle, knee and back impairment. (CX-18 at 21). Regarding maximum medical improvement ("MMI"), Dr. Steinway indicated that Claimant has reached MMI in relation to his ankle, but not to his knee or back. (CX-18 at 21-24). However, immediately after, he opined that all three injuries are permanent, although the knee and back require additional treatment. (CX-18 at 25-26). Dr. Steinway opined that the injuries Claimant sustained to his lower back, right ankle, right knee and right leg were all caused by his October 30, 2002 injury. (CX-18 at 25).

On cross-examination, Dr. Steinway testified that he examined Claimant at the request of Claimant's counsel and did not render any treatment. (CX-18 at 27). Dr. Steinway opined that

Claimant is not totally disabled (CX-18 at 38), but upon re-direct examination, he seemed to indicate that only after Claimant undergoes the treatment he recommended and was re-evaluated would he be able to work in a sedentary or light-duty position. (CX-18 at 42).

Dr. Sultan

Dr. Sultan is a Board-certified orthopedic surgeon. (EX-18 at 4). He was retained by Employer to examine Claimant. (EX-18 at 8). According to Dr. Sultan, Claimant did not report any injury to his lower back when Dr. Sultan first examined him in December of 2002. (EX-18 at 12-13). Claimant complained of problems with his right ankle and "a clicking sensation involving his right knee, and at times he felt as if his right knee was giving out on him." (EX-18 at 14). Dr. Sultan detected a patellar click when bringing Claimant's knee out of flexion into extension. (EX-18 at 14). Relative to Claimant's right ankle, Dr. Sultan's physical exam revealed mild swelling and localized soreness. (EX-18 at 15). He opined that Claimant was partially disabled due to the right knee and ankle and was not able to return to work as a longshoreman. (EX-18 at 16-17).

Dr. Sultan indicated that when he saw Claimant on December 18, 2002, he questioned him regarding his treatment with Dr. Weinberg relative to a November 29, 2002 report of Dr. Weinberg, and Claimant specifically denied any injury to the back. (EX-18 at 18-19). Later in his deposition, Dr. Sultan testified that Claimant did report a back injury at the time of his second visit. (EX-18 at 36). Dr. Sultan reported finding no orthopedic or neurological impairment relating to a spinal injury. (EX-18 at 37-38). He opined that Claimant's back did not require further treatment or chiropractic intervention. (EX-18 at 40).

According to Dr. Sultan, Claimant offered no complaints relative to the right ankle in November of 2004. (EX-18 at 21-22). Claimant did however complain of pain in the right side of his back radiating through the right side of his buttocks and into the right leg. (EX-18 at 22). He also complained of pain in the right knee and sleeping poorly. (EX-18 at 22). Dr. Sultan again examined the right ankle and found no ongoing problem. (EX-18 at 22). Dr. Sultan opined that there is no residual dysfunction regarding Claimant's right ankle, no need for further treatment thereof and Claimant suffers no physical limitations with respect to the ankle. (EX-18 at 23).

On September 1, 2004, when Dr. Sultan evaluated Claimant's right knee, he detected a patellar click and Claimant complained of mild soreness on palpitation over the medial joint line. Dr. Sultan found the knee to be "pretty stable" and did not feel additional treatment was necessary and therefore opined that Claimant had reached MMI. (EX-18 at 28). As of September 1, 2004, Dr. Sultan felt Claimant was capable of returning to work as a forklift operator. (EX-18 at 30).

During his final examination of Claimant on November 17, 2004, Dr. Sultan found no inflammatory changes in the knee and all ligaments in the knee to be intact. The patellar click was gone as were the complaints of pain along the medial joint. (EX-18 at 31). Dr. Sultan also evaluated the MRI films of October 2004 and opined that additional surgery is not necessary. (EX-18 at 33-34). He did not feel Claimant was restricted from employment such as a parking

lot cashier or driving job. (EX-18 at 47). Dr. Sultan does not feel as though Claimant has any permanent impairment as a result of the October 2002 accident. (EX-18 at 47).

On cross-examination, Dr. Sultan admitted that Claimant's complaints of low back pain, the CT scan and the EMG findings are all consistent, but insisted there were no corroborating findings on physical examination, leading him to opine that Claimant does not have radiculopathy. (EX-18 at 52-53).

Dr. Sultan's December 18, 2002 report indicates that Claimant had an accident on October 30, 2002, while performing the duties of a longshoreman. According to this report, Dr. Sultan was aware, on December 18, 2002, that Claimant had been treated by a podiatrist (Dr. Vinchinsky), an orthopedist (Dr. El-Dakkak) and a chiropractor (Dr. Weinberg). As to Claimant's treatment with Dr. Weinberg, Dr. Sultan's report states, "He also came under the care of Dr. R. Weinberg, a chiropractor on 11/29/02 for spinal adjustment, but his spine was not injured in the course of this accident." (EX-5). However, Dr. Sultan's report of March 13, 2003 indicates that Claimant denied lower back injury when Dr. Sultan first examined him on December 18, 2002.

Dr. Sultan opined that there is a causal relationship between the workplace accident of October 30, 2002, and the injuries to the right ankle and knee. However, based on Claimant's history and Dr. Sultan's December 18, 2002 findings, he did not believe Claimant suffered a back injury in relation to that accident.

Dr. Oppenheim

Claimant was examined by Dr. Oppenheim, an orthopedic and reconstructive plastic surgeon, on February 10, 2004, at Employer's request. In his report, Dr. Oppenheim noted that Claimant reported undergoing spinal adjustments "and also made note that the spinal complaints were not indicated in the course of the accident." (EX-7).

Physical examination of the right knee indicated that range of motion was diminished, but according to Dr. Oppenheim, was "being blocked by his size." (EX-7). Dr. Oppenheim found the patella to be tracking normally. He did note medial laxity and medial knee pain. On physical examination of the right ankle, Dr. Oppenheim noted that there was no swelling, but there was tenderness on palpation. X-rays of the ankle revealed no significant findings. X-rays of the knee showed narrowing of the medial joint line as well as osteophytes. (EX-7).

Dr. Oppenheim opined that Claimant sustained a lateral accident sprain in connection with the October 30, 2002 accident. However, Dr. Oppenheim opined that Claimant had recovered. He also opined that Claimant sustained some type of strain or sprain to the right knee, however, Dr. Oppenheim felt that the wear of the right knee was due to Claimant's weight. Dr. Oppenheim essentially stated that Claimant would be unable to rehabilitate his injuries due to his weight. (EX-7).

Dr. Oppenheim re-evaluated Claimant on July 11, 2004. He opined that Claimant had reached MMI despite noting that Claimant has difficulty moving and uses a cane on the right

side. In addition, palpation showed tenderness in several areas of the right knee. Dr. Oppenheim noted "suggestion of catching of the patella through the arc of motion." (EX-9). Again, Dr. Oppenheim opined that "any additional treatment based upon his size would [not] provide him with any additional improvement." (EX-9). He did not feel Claimant was capable of any lifting, although he did think he would be able to drive a fork lift. He believed Claimant would be reinjured within a short time of returning to his work as a longshoreman. He calculated a 7 percent impairment of the whole person based on Claimant's gait disturbance. (EX-9). Dr. Oppenheim later reported that this impairment rating translates to a 17 percent impairment of the lower extremity. (EX-10).

Dr. Oppenheim also completed a Work Restriction Evaluation (Form OWCP-5). As a result of this evaluation he noted that Claimant can walk and stand for less than 2 hours and cannot push, pull, lift, squat, kneel or climb for any amount of time. In addition, he put a question mark next to "Twisting" and "Operating a Motor Vehicle." (EX-9).

MRI Reports

An MRI report of February 5, 2003, indicated "Vertical full thickness tear body and clubbing deformity" of the posterior horn medial meniscus, as well as a tear in the posterior horn lateral meniscus, also with clubbing deformity. The report also showed a tear in the anterior horn of the lateral meniscus. (CX-1). An October 12, 2004 MRI report indicates "tearing of the posterior horn of the lateral meniscus and the posterior horn of the medial meniscus." (CX-11). This MRI also showed a patellar tilt. (CX-11).

Operative Report

The operative report, prepared on November 4, 2003, indicated a preoperative diagnosis or a torn meniscus in the right knee. The postoperative diagnosis was "tear medial and lateral menisci with contusion, chondromaclacia femoral condyle with bruises, synovitis and longitudinal medial plica going down to the anterior horn with synovitis." (CX-2). The procedure involved a partial anterior horn medial meniscectomy as well as a partial lateral meniscectomy.

CT Scan

A CT scan of the lumbosacral spine, done on March 2, 2004, indicated bulging discs at the L3-L4 and L4-L5 levels. The CT scan also showed a herniated disc at L5-S1. Rotatory scoliosis and stenosis were indicated in the radiology report as well. (CX-3).

Physical Therapy Records

The psychical therapy records, beginning on December 3, 2003 indicate a torn meniscus as a result of a work injury. These records also indicate that Claimant hurt his ankle in that accident. Records of March 3, 2004 show that Claimant was also treated by the same physical therapy facility for back pain prior to the October 30, 2002 injury. (CX-5).

Neurology Report

On August 6, 2004, Claimant was examined by Dr. Noel Fleischer, a Board-certified neurologist. Dr. Fleisher noted abnormalities consistent with L5-S1 nerve root injury. He recommended that Claimant continue taking the prescribed medications, continue chiropractic treatments and follow-up with an orthopedist. Dr. Fleisher also prescribed pain medication. (CX-6).

C. Psychological Evidence

Dr. Lewis

Dr. Lewis is a clinical psychologist. (CX-22 at 3). He first saw Claimant on March 17, 2004. (CX-22 at 4). Claimant sought treatment from Dr. Lewis because he was "in a rage" and could not control his temper. (CX-22 at 9). In Dr. Lewis's opinion, Claimant felt "absolutely and totally useless" and like "he had no purpose on this earth" and Dr. Lewis labeled him "passively suicidal." (CX-22 at 9-10).

Dr. Lewis diagnosed Claimant with dysthymic disorder, "which is basically a more chronic form of depression." (CX-22 at 10). Dr. Lewis also gave Claimant a global assessment of functioning score of 51, which indicates that Claimant's psychological problems were affecting him significantly in almost every area of functioning. (CX-22 at 11). Dr. Lewis prescribed psychotherapy, once per week for 45 minute sessions and Claimant never missed a session despite having a long commute. (CX-22 at 11-12). After a few months of this therapy, Dr. Lewis sent Claimant to his family doctor who prescribed Zoloft for depression and eventually Trazodone for sleeping. (CX-22 at 12-15).

Dr. Lewis saw Claimant for the last time on April 27, 2005. In the doctor's opinion, Claimant had shown significant improvement during the course of treatment. (CX-22 at 15). However, Dr. Lewis still worried that if Claimant were to return to work "he would not be able to control himself even with the medication, even with the therapy," when a stressful situation arose. (CX-22 at 17).

Dr. Lewis opined that the October 30, 2002 accident was a substantial contributing factor to Claimant's depression. (CX-22 at 20). Dr. Lewis attributed Claimant's depression to his constant pain as well as his reduced self-esteem resulting from no longer feeling like the head of household and the provider for his family. (CX-22 at 20). Dr. Lewis is not certain that Claimant's depression is a permanent condition, but rather feels that he could move beyond it with additional therapy. Dr. Lewis feels that if Claimant does not return to therapy his condition may deteriorate. (CX-22 at 24).

Dr. Lewis' report, dated January 11, 2005, indicates that at the time of Claimant's initial visit, Claimant sobbed while describing his rage towards his wife and children and his feelings of worthlessness. Claimant showed aggression regarding the fact that it was taking so long to get authorization for medical treatment. According to this report, in June of 2004, Claimant was still experiencing panic attacks, distrust of others, short temper, sleep disturbances, low self-esteem

and explosive episodes. After his Zoloft was increased to 100 milligrams daily, on July 14, 2004, Claimant began to feel more in control of his anger and resentment. However he still experienced low self-worth, guilt and trouble sleeping. On January 11, 2005, at the time this report was written, Dr. Lewis still felt Claimant was psychologically disabled secondary to his physical disability. (CX-9).

Regarding the report of Dr. Gallina, infra, Dr. Lewis noted that Dr. Gallina met with Claimant only once, at which time Claimant was medicated and had received over three months of psychotherapy. Dr. Lewis further noted that Claimant could have been having a good day and should have been expected to show symptomatic improvement, however, withholding the treatment would cause Claimant to suffer again, according to Dr. Lewis. (CX-9).

Dr. Gallina

Dr. Gallina is a licensed psychologist in the State of New Jersey. (EX-19 at 5). She examined Claimant on June 30, 2004 and prepared a report. (EX-19 at 8). Dr. Gallina found that Claimant exhibited no outward signs of a psychological disability when judging by his appearance, speech, thought processes, concentration and attention. (EX-19 at 18). Claimant indicated that he felt worthless and useless and full of hate, but also indicated that he was not depressed, but disgusted and fatigued. (EX-19 at 30).

Dr. Gallina testified that she reviewed Dr. Lewis' January 11, 2005 report and found it very different from her own. (EX-19 at 31). Dr. Gallina felt it would be atypical for a patient suffering from depression to have a "good day" since depression is "unremitting," and therefore did not feel as though that could explain the difference between her own report and that of Dr. Lewis. (EX-19 at 33-34).

In Dr. Gallina's opinion, Claimant is not disabled from a psychological standpoint. In addition, Dr. Gallina opined that Claimant was not in need of treatment from Dr. Lewis. (EX-19 at 36). She opined that Claimant embellished his subjective complaints. (EX-8).

Dr. Gallina felt Claimant "has experienced a normal emotional reaction to an accident. His reaction is neither maladaptive, nor psychologically disabling, and does not reach a level that could be considered a psychological illness." (EX-8). Dr. Gallina found no psychological abnormalities and thus opined that treatment is not indicated and Claimant is not disabled from a psychological standpoint. (EX-8).

D. Vocational Evidence

Dr. Kincaid

Dr. Kincaid is a vocational rehabilitation counselor. He interviewed Claimant and administered tests to determine his intellectual and academic abilities and then performed a McCrusky Transferable Skills Analysis. (CX-19 at 6-7). The skills analysis showed "pre-injury there were 109 jobs [Claimant] could either perform or be trained to perform." (CX-19 at 10).

Dr. Kincaid administered the Beck Depression Inventory-Second Edition and found Claimant to be severely depressed. (CX-14). Although noting this inventory should be used only in conjunction with clinical observation, Dr. Kincaid opined that Claimant's psychological state limits him to a specialized workplace where he can break as he needs to, has consistent tasks to perform, and where there is predictability. (CX-19 at 17-18).

Dr. Kincaid also considered Claimant's functional limitations, as determined through a series of testing, and found that Claimant could only perform sedentary jobs given his medical restrictions. Also, in Dr. Kincaid's opinion, Claimant is not capable of driving a forklift, because that is a medium duty job according to the Department of Labor Dictionary of Occupational Titles. (CX-19 at 20).

After considering the foregoing, Dr. Kincaid opined that although Claimant could be trained to perform or could perform 109 jobs prior to the accident, "there were no jobs that matched [Claimant's] post injury vocational profile." (CX-19 at 15). Thus, Dr. Kincaid concluded that Claimant is unemployable.

Ms. Sharon Levine

Ms. Levine is a Masters level vocational rehabilitation consultant. (EX-17 at 3). She did not interview nor test Claimant but did read his deposition testimony. (EX-17 at 10-11). By looking at his past experiences, Ms. Levine determined that Claimant was able to make decisions, read, communicate, organize, follow and give directions, react and make changes and follow sequences. (EX-17 at 13). Ms. Levine reviewed a functional capacity evaluation which showed Claimant could lift 20 pounds and had good material load handling ability, which qualified him for light work. (EX-17 at 16). According to Ms. Levine, the evaluation also revealed that Claimant put forth less than full effort, therefore limiting himself to light work. (EX-17 at 16). Still, Ms. Levine focused on jobs that fell into the sedentary to light range. (EX-17 at 17).

Ms. Levine admitted that she was given and reviewed only the reports of Employer's consultants. She had no records and reviewed no records from any of Claimant's treating physicians. (EX-17 at 37-40).

Ms. Levine also submitted the results of a labor market survey, dated October 30, 2002. In this report, she specified the following:

Job Title	Employer & Location	Date of Job Opening	Salary	Hours Available	Requirements
Parking Lot Attendant	PF Parking in Brooklyn, NY	October 2004	$14,560 annually	8 hour shifts	Continuous sitting, but employees can stand if they prefer. Frequent reaching. Occasional twisting and rotating.

Parking Lot Attendant	Five Star Parking in LaGuardia & JFK Airports	August 2004	$8.50 per hour	Not specified	Continuous sitting, but employees can stand if they prefer. Frequent reaching. Occasional twisting and rotating.
Parking Lot Attendant	Avistar Airport Parking in Jamaica, NY	August 2002	$18,200-$22,984 annually	Not specified	Continuous sitting, but employees can stand if they prefer. Frequent reaching. Occasional twisting and rotating.
Lot Attendant/ Valet/ Shuttle Driver	Kings Jaguar & Volkswagon in Brooklyn, NY	October 2004	$18,720-$20,800 annually		Must drive cars with or without passengers. May be required to do light deliveries, empty garbage cans, sweep and wash cars.
Lot Attendant/ Valet/ Shuttle Driver	Northeast Automarine Terminal in Jersey City, NJ	No openings available at time of labor market survey.	$9.00 per hour	8 hours per day.	Ability to drive stick shift. Frequent sitting. Occasional standing, walking and bending. Occasionally required to operate foot controls.
Shuttle Driver	National Car Rental in East Elmhurst, NY	Not specified.	$16,640-$20,800 annually		Requires a commercial driver's license with air brake certification. Infrequent lifting up to 25 pounds.

(EX-15).

Report of Kinematic Consultants

EX-12 is a report from Kinematic Consultants, where Claimant was examined by Richard Sova and M. Elizabeth Bodine. These individuals opined that Claimant did not extend full effort during the evaluation, therefore limiting himself to light duty work. They found Claimant capable of performing administrative duties, light cleanup, driving and lifting up to 20 pounds. According to Kinematic Consultants, Claimant can return to work as a longshore driver in an altered duty capacity or can perform other light duty work. (EX-12).

Report of Smolkin Vocational Services

A vocational assessment of Claimant was conducted on September 14, 2004, by Smolkin Vocational Services. The report states that a forklift operator's work would be classified as light if the operator was not required to do any lifting and recommended that Claimant return to working on the waterfront as a forklift operator. The evaluator also opined that Claimant could perform work as a security monitor or cashier, but did not recommend these positions because of their low earning potential. (EX-14).

An attached labor market survey, dated December 2, 2004, gave specific job openings in the security field. Of the seven companies identified, only four offered salary information, and the salary ranged from "at least minimum wage [of] $5.15 per hour" to "6.50 to $10.00 per hour depending on the site." (EX-14). However, this report does not specify how many hours per

week these jobs were available. In addition, Claimant would have to attend two training classes and undergo a background check before being hired in the security field, which would cost approximately $230. (EX-14). Most importantly, the physical demands of the job were not noted.

Letter from Employer to Claimant

Employer sent Claimant a letter, dated August 17, 2004, expressing its opinion that Claimant's "job as a forklift driver is within the physical capabilities of the functional evaluation performed. Accordingly, we believe that [Claimant] can and should be working as a forklift driver." (EX-13). Employer's letter also states that Employer was willing to make any accommodations necessary for Claimant to perform in the position of a forklift driver. Finally, the letter states that it was to be considered "an offer of return to duty effective immediately." (EX-13).

Claimant's W-2 Statements

Claimant's W-2 statements for the year 2002 show that Claimant earned approximately $25,300 in the year 2002. (CX-13).

Work/Wage History

Employer submitted what it refers to as "Claimant's work/wage history." (EX-21). This data covers the period between June 9, 2002 and October 30, 2002. This exhibit shows that Claimant worked 914 hours over a period of 21.43 weeks and earned a total of $18,913.50. According to Employer's cover letter, this exhibit was to serve as its notice that Claimant "has received benefits based on an erroneous average weekly wage of $1,022.00," and Employer is claiming an overpayment to be recouped from any future benefits. Based on this exhibit, Employer argues that Claimant's average weekly wage is $882.57, with a corresponding compensation rate of $558.38 per week. (EX-21).

E. Newly Discovered/Submitted Evidence

As discussed above, Employer requested leave to submit additional evidence provisionally identified as EX-22, which I allowed pursuant to my August 22, 2005 Order. EX-22 is a set of records relating to a suit filed in New York state court, in which Claimant, in relevant part, seeks compensation for an injury sustained to the right foot and psychological and emotional trauma. (EX-22).

Bill of Particulars

The Bill of Particulars filed in conjunction with the claim filed by Claimant in New York state court, alleges that Claimant was walking down a New York City street on February 3, 2002, when he fell "as a result of a raised covering instrument for the power supply into the premises." (EX-22). Claimant alleged that he sustained a stress fracture and other injuries to the right foot, requiring him to wear a cast and use crutches. In addition, Claimant alleges that he suffered

"Marked severe neurological, psychological and emotional trauma evidenced by irritability, sleeplessness, nightmares, anxiety, apprehension and other like similar symptoms." (EX-22).

Medical Records

It appears that the medical records that were submitted in relation to the New York state claim came solely from Dr. Vichinsky. There are films of the right foot dated February 4, 2002 and treatment notes and a radiology report bearing that same date indicate that Claimant had a stress fracture and was placed in a shortleg cast. The treatment note of February 4, 2002 states, "Patient reports stepping on 'piece of wood while walking yesterday'." (EX-22).

III. ANALYSIS

Employer concedes that Claimant was injured on October 30, 2002, in the course and scope of his employment and that Claimant sustained a permanent disability as a result of those injuries. However, the parties disagree as to whether Claimant's back and psychological injuries are related to the October 30, 2002 accident, whether Claimant has reached MMI, whether Claimant's disability is total or partial, the amount of Claimant's average weekly wage, and whether Employer is responsible for certain medical expenses.

A. Causation

Claimant alleges injuries to his right knee, right ankle and lower back as well as a psychological condition resulting from his workplace accident of October 30, 2002. Employer concedes that the right ankle and right knee injury resulted from that accident.[5]

Under §20(a) of the Act, Claimant bears the initial burden of making out a *prima facie* case of causation. Section 20(a) states that Claimant must establish that he suffered a physical harm and that conditions existed at work which could have caused the harm or pain. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128 (1984). Once a *prima facie* case has been established, Claimant is entitled to the rebuttable presumption that the injury was caused by Claimant's employment. 33 U.S.C. §920(a).

In order to rebut the §20(a) presumption, the employer must produce substantial countervailing evidence which proves that the injury was not causally connected to Claimant's employment. 33 U.S.C. §920; *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 1082, 4 BRBS 466, 475 (D.C. Cir.), *cert denied*, 429 U.S. 820 (1976). If the employer is successful in rebutting the presumption, the issue of causation must be resolved on the record as a whole. *Frye v. Potomac Electric Power Company*, 21 BRBS 194, 196 (1988).

[5] Although Employer initially admitted the ankle injury was caused by the October 30, 2002 accident, it seems as though after learning of the suit pending in New York state court and the injuries alleged therein, Employer is arguing that the ankle injury is not causally related. However, the evidence submitted in relation to the New York suit is insufficient to support such an argument since every doctor who offered an opinion on the subject opined that Claimant's ankle injury was related to the October 30, 2002 accident.

Claimant has met his *prima facie* burden with respect to his back injury. There was a CAT scan taken of Claimant's lumbar spine, which revealed disc herniation at the L5-S1 level, as well as bulging discs at the L3-L4 level. In addition, the results of an EMG were deemed consistent with nerve root injury at L5-S1 and Claimant was diagnosed with lumbosacral radicular syndrome. Employer has conceded that a work place accident occurred on October 30, 2002, and Claimant testified that his back began to hurt following that accident, after his ankle had healed enough that he could begin to bear weight on it again. I find these facts sufficient to show that an injury occurred and conditions existed in the workplace which could have caused the injury. Thus, Claimant has invoked the § 20(a) presumption.

In order to rebut the presumption, Employer argues that Claimant did not state his back was injured when filling out the LS-202, and alleges that Claimant specifically denied a lower back injury resulting from the October 30, 2002 accident, when Dr. Sultan inquired as to his treatment with a chiropractor. (Employer's Brief at 25). I also note that Dr. Oppenheim's report indicated that Claimant stated that his spinal complaints did not result from his October 30, 2002 accident. I find this to be substantial countervailing evidence, sufficient to revoke the presumption. Thus, the issue of causation must be resolved on the record as a whole.[6]

Claimant was first treated for lower back pain by Dr. Weinberg, on November 29, 2002. Employer was aware of the back injury either on that day or the day after, according to Dr. Weinberg's deposition testimony. Also, despite Employer's argument to the contrary, I find that Claimant reported increased pain in his right knee and back during his December 17, 2002 visit with Dr. Vichinsky. In addition, Dr. Sultan's report dated December 18, 2002, specifically states, "[Claimant] also came under the care of Dr. R. Weinberg, a chiropractor on 11/29/02 for spinal adjustment, but his spine was not injured in the course of this accident." (EX-5). Although Dr. Sultan's report of March 13, 2003, specifically states that on December 18, 2002, Claimant "denied any injury to his lower back and made no complaints in regard to the lumbar spine or thoracic spine," this statement carries little weight since the December 18 report specifically speaks of treatment to the spine. In addition, I do not credit Dr. Oppenheim's averment that Claimant denied that his back injury resulted from the October 30, 2002 injury. According to Dr. Oppenheim, Claimant said this on February 10, 2004. This is completely inconsistent with the reports Claimant made to several other doctors previously and Claimant's testimony in this matter, which came after February 10, 2004. Because Claimant and his doctors have testified that Claimant reported back pain caused by the October 30, 2002 workplace accident, it would be illogical for Claimant to then specifically deny a causal relationship between the accident and his back injury to Employer's doctors.

After considering the record as a whole, I find that Claimant's back began to cause him pain sometime around November 29, 2002, approximately one month after he fell from the hi-lo while working for Employer. This is consistent with Claimant's testimony at the formal hearing in this matter, which indicated that he began experiencing back pain 3 to 4 weeks after the accident, after his ankle began to heal and he was able to walk around again. I also note that

[6] Employer also argues that Claimant did not tell Dr. Vichinsky that he was experiencing lower back pain, and did not report back problems to Dr. Dakkak. I find these arguments to be contrary to the evidence of record.

Claimant did not see Dr. Dakkak in relation to his knee injury until November 21, 2002, approximately one week before seeking treatment for his back. The amount of time that Claimant waited to seek treatment for his back cannot be deemed unreasonable under these circumstances, and therefore does not sever the causal connection between the workplace accident and the back injury.

In addition, Dr. Weinberg specifically opined that Claimant's back injury directly resulted from the October 30, 2002 accident. In the undated supplemental report submitted into evidence as CX-15, Dr. Vichinsky opined that the antalgic gait that developed as a result of the ankle injury caused lower back pain. Dr. Dakkak also opined that Claimant's back injury could be aggravated by an antalgic gait. According to Dr. Steinway, when he first examined Claimant on June 4, 2005, Claimant complained of an injury to his lower back as a result of the October 30, 2002 accident. Dr. Steinway did find that Claimant suffers from radiculopathy at the L5-S1 level, and he opined that this condition was a result of Claimant's October 30, 2002 accident. Although Dr. Sultan and Dr. Oppenheim disagree with Claimant's doctors, I find the weight of the evidence supports Claimant's position.

I also note that Claimant was healthy enough to lift 500 bags weighing 80 pounds each on October 29, 2002, and developed a lower back injury sometime between October 30 and November 29, 2002. Given Claimant's own testimony and that of Drs. Weinberg, Vichinsky and Dakkak, I find that Claimant has proven that his back injury is causally related to his October 30, 2002 workplace accident by a preponderance of the evidence.

Claimant has also met his *prima facie* burden with respect to his psychological condition. Dr. Lewis diagnosed Claimant with and treated Claimant for dysthymic disorder. Dr. Lewis' reports and deposition testimony indicate that Claimant's aggression and other symptoms were a result of the injuries sustained and the delay in treatment thereof. Thus, Claimant has invoked the § 20(a) presumption.

To rebut the presumption, Employer offered the expert testimony of Dr. Gallina. Dr. Gallina's testimony and report indicate that Claimant displayed no signs of a psychological disability. In addition, Employer submitted evidence that Claimant has a suit pending in New York State Court in which he made a claim for "marked severe neurological, psychological and emotional trauma evidenced by irritability, sleeplessness, nightmares, anxiety, apprehension and other like symptoms," as a result of an alleged fall that occurred on February 3, 2002. This claim, which is for symptoms that are remarkably similar to those that Claimant complained of to Dr. Lewis, predates the October 30, 2002 claim. Thus, I find that Employer has produced sufficient evidence to rebut the § 20(a) presumption.

Upon weighing all of the evidence of record, I find that Claimant has failed to establish a causal connection between his alleged psychological disability and his October 30, 2002 accident. I find Drs. Lewis and Gallina to be equally qualified to render an opinion in this case. Although I give the opinion of Dr. Lewis slightly more weight because he was the treating physician, that is overcome by the fact that Claimant hid the February 3, 2002 accident, which occurred ten months prior to this one, and he is seeking compensation for the same psychological injury as a result of both accidents. Thus, I find that this injury was pre-existing. Claimant not

only failed to prove it was exacerbated by the October 30, 2002 accident, but denied the pre-existing injury all together. I therefore find that Claimant has failed to establish causation in regard to the psychological claim.

B. Nature of the Injury

A claimant is permanently disabled if after reaching MMI, he has a residual disability. *Louisiana Insurance Guaranty Association v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994). The date that MMI is reached is to be determined by medical factors without regard to a claimant's economic situation. *Id.* Generally, if further surgery is anticipated, MMI has not been reached. *Kuhn v. Associated Press*, 16 BRBS 46, 48 (1983). However, the mere possibility of surgery does not automatically preclude a finding of permanency. *Worthington v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 200, 202 (1986). Instead, an inquiry must to be made as to whether treatment continues to be curative or has become palliative. *Leech v. Service Engineering Co.*, 15 BRBS 18, 21(1982).

Claimant's ankle injury has resulted in a permanent disability. Although Dr. Vichinsky, who treated this specific injury, was not able to say with any degree of certainty whether Claimant had reached MMI with respect to this injury, Dr. Steinway, an orthopedic surgeon, opined that Claimant has reached MMI. Dr. Sultan, Employer's expert, also opined that Claimant has reached MMI with respect to his ankle.

Claimant's knee injury has also resulted in permanent disability. Dr. Dakkak, who performed Claimant's first knee surgery, opined that Claimant's knee condition is permanent based on the results of an October 12, 2004 MRI. Although Claimant is willing to undergo additional surgery, Dr. Dakkak estimates that surgery will be needed once per year to clean the knee out. Thus, the treatment is considered palliative. Dr. Steinway opined that Claimant had not reached MMI with respect to his knee injury, but Employer's consultant, Dr. Sultan, agrees that MMI has been reached. Dr. Sultan opined that Claimant reached MMI on September 1, 2004, although Claimant was still complaining of soreness as of that date. I find that Dr. Dakkak's opinion is entitled to the most weight since he treated the knee injury, and because it is supported by Dr. Sultan's opinion, I find that Claimant has reached MMI. However, I reject September 1, as offered by Dr. Sultan, as of the date of MMI and find that Claimant reached MMI on October 12, 2004, since that date was offered by the treating physician and was based on an MRI. Thus, Claimant's injuries to the lower right extremity reached MMI, and therefore his disability became permanent, on October 12, 2004.

Claimant's back injury has also resulted in permanent impairment. Dr. Weinberg, who treated the back, opined that Claimant has reached MMI despite continuing to treat Claimant, which indicates the treatment has become palliative. In addition, although surgery is mentioned in the record, Dr. Weinberg's deposition testimony indicates that surgery is not anticipated. In addition, Dr. Dakkak specifically advised against the surgery. I find that Claimant has reached MMI with respect to his back injury and find May 10, 2005 to be the date that MMI was reached, since this is the date of Claimant's last visit with Dr. Weinberg preceding Dr. Weinberg's deposition, at which Dr. Weinberg first articulated that Claimant's disability had become permanent.

C. Extent of the Disability

To establish a *prima facie* case of total disability, the employee must show that he is unable to return to his usual employment due to his injuries. If the claimant establishes a *prima facie* case, the burden shifts to the employer, who must then show that suitable alternative employment exists. *Clophus v. Amoco Prod. Co*., 21 BRBS 261 (1988); *Nguyen v. Ebbtide Fabricators*, 19 BRBS 142 (1986). The employer meets this burden by identifying specific jobs in the local community that are available to the claimant. *Armfield v. Shell Offshore, Inc*., 30 BRBS 122, 123 (1996). The employer also must show the claimant could perform such jobs given his age, education, work experience and physical restrictions. *Edwards v. Director*, OWCP, 99 F.2d 1374 (9th Cir. 1993); *cert*. *denied*, 511 U.S. 1031 (1994). The factfinder is to determine the claimant's restrictions based on the medical evidence and decide whether the claimant is capable of performing the jobs identified by the employer. *Villasenor v. Marine Maintenance Indus.*, 17 BRBS 99 (1985). The employer must show that the job opportunities are realistic and does so by establishing the nature, availability and terms of the employment. *Thompson v. Lockheed Shipbuilding & Constr. Co.*, 21 BRBS 94, 97 (1988). If the employer meets this burden, the claimant must then prove that he has made a diligent attempt to secure employment. *Palombo v. Director,* OWCP, 937 F.2d 70; 25 BRBS 1 (CRT) (2nd Cir. 1991).

Due to the physical nature of Claimant's pre-injury employment, I find he is incapable of returning to his previous position as a longshoreman. This finding is supported by the opinions of Drs. Dakkak, Weinberg, Steinway, Sultan and Oppenheim. Thus, Claimant has made out a *prima facie* case of total disability and Employer bears the burden of proving the existence of suitable alternate employment.

Initially, Claimant's physical limitations must be identified. Based on the opinion of Dr. Dakkak, I find that Claimant is unable to drive a forklift and unable to kneel, due to instability of the right knee. Based on the opinion of Dr. Oppenheim, I find that Claimant can walk and stand for no more than 2 hours and is incapable of pushing, pulling, lifting, squatting, kneeling or climbing for any amount of time. I also find these limitations to be supported by Claimant's testimony.

I accept the opinion of Claimant's vocational expert, Dr. Kincaid, indicating that Claimant is unable to drive a forklift, since the medical evidence of record supports this opinion. However, I reject Dr. Kincaid's opinion indicating that Claimant is unable to perform any work until he receives further treatment, and that Claimant should then be limited to sedentary work, since the weight of the medical evidence shows that Claimant is capable of performing light work at the present time. I also reject Dr. Kincaid's finding that Claimant is severely depressed. Dr. Kincaid admitted that the test he used to measure Claimant's level of depression should be used only in conjunction with clinical observation. In addition, I have credited the opinion of Dr. Gallina over that of Dr. Lewis, and as a result, found that Claimant does not suffer a psychological injury as a result of the October 30 workplace accident. Because I reject Dr. Kincaid's findings as they relate to Claimant's psychological condition, and because I find that Claimant is capable of performing light work, contrary to Dr. Kincaid's opinion, I therefore reject Dr. Kincaid's ultimate conclusion, that Claimant is not employable.

I also reject the findings contained within the labor market survey prepared by Smolkin Vocational Services. First, this labor market survey was based in part on a finding that Claimant is capable of frequent walking; a finding I reject as contradicted by Claimant's testimony and the medical evidence of record. Second, the only employment opportunity identified with any degree of specificity was that of a security guard. However, this report does not include a description of the physical demands of the job. In addition, while an hourly rate is identified for a few of the security companies that were identified, the report neglects to state how many hours per week these jobs are available, making it impossible to determine Claimant's wage earning capacity based on this information.

Ms. Levine's labor market survey, on the other hand, does establish suitable alternate employment. Despite the fact that Ms. Levine did not review the reports of Claimant's treating physicians, I still find her labor market survey useful in that it identifies employment opportunities of a sedentary or light nature, which I find Claimant can perform despite his physical limitations. Specifically, I find that Claimant is capable of performing the duties of the parking lot attendant positions identified by Ms. Levine, since Claimant would be sitting most of the time but could stand if he prefers, and he is capable of frequent reaching and occasional twisting or rotating.[7] According to Ms. Levine, the 3 parking lot attendant positions that she identified pay $14,560 per year, $8.50 per hour and $18,200-$22,984 per year. Because Ms. Levine failed to state how many hours per week the job which paid $8.50 per hour was available, Claimant's alternate wage earning capacity is found by averaging the salary information for the other two positions.[8] Thus, I find that Claimant has an alternate earning capacity of $16,380 per year, which corresponds to a weekly wage of $315.

Because this wage earning capacity was identified by Ms. Levine on December 29, 2004, I find that Claimant's disability became partial, rather than total, as of December 29, 2004.

D. Scheduled Loss

Claimant is entitled to compensation for a permanent partial disability to the right lower extremity. Pursuant to § 908(c)(2) of the Act, a Claimant who losses a leg is entitled to 288 weeks of compensation, to be paid at a rate of 66⅔ of his average weekly wage. Dr. Oppenheim, the only expert witness to offer an impairment rating, opined that Claimant has suffered a 17 percent loss of use of the right leg. I find Dr. Oppenheim's opinion to be supported by his own findings as well as the other medical evidence of record. Thus, Claimant is entitled to permanent partial disability benefits for 48.96 weeks according to the schedule.

[7] I find that Claimant is incapable of performing the other jobs identified by Ms. Levine, since they require more physical activity, such as sweeping, emptying garbage, walking, bending and lifting. In addition, these jobs all require Claimant to operate a vehicle, a duty that may prove unsafe due to the instability of Claimant's knee.

[8] Although a salary range was offered in relation to the third job, because Claimant has never performed this kind of work before, I assume he would start at the low-end of that range. Thus, I used $18,200 for purposes of my calculations.

E. Average Weekly Wage

AWW is determined by utilizing one of three methods set forth in §10 of the Act. Both Claimant and Employer use §10(a) to calculate Claimant's AWW. Section 10(a) of the Act, reads as follows:

> (a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary for a six-day worker and two hundred and sixty times the average daily wage or salary for a five-day worker, which he shall have earned in such employment during the days when so employed.

Both Claimant and Employer used the total amount of wages earned by Claimant during the period that he worked as a longshoreman and divided that amount by the number of weeks in that period. Claimant contends that his AWW is $918.44, with a corresponding compensation rate of $612.29 per week. Claimant has included in his calculation of total wages earned as a longshoreman a payment of $640.00, which he titles NYSA-ILA Vacation/Holiday Fund. In addition, Claimant divides the total amount earned as a longshoreman by 21.29 weeks. (Claimant's Brief at 28). Employer, on the other hand, alleges an AWW of $882.57, which would yield a compensation rate of $588.38 per week. Employer argues that the Vacation/Holiday Fund payment was paid after the relevant 52 week period prior to the accident. In addition, Employer's calculations are based on an assertion that Claimant worked 21.43 weeks as a longshoreman. (Employer's Brief at 30-31).

Initially, I note that included in the definition of wages, found at § 2(13) of the Act, is "any advantage that is received from the employer and included for purposes of any withholding of tax." As a result of this concentration on whether certain benefits are considered income for tax purposes, an issue has arisen as to whether holiday and vacation pay should be included in the year earned or the year received. *See Sproull v. Stevedoring Services of America*, 25 BRBS 100 (1991); *Parks v. John T. Clark & Son of Maryland, Inc.*, 9 BRBS 462 (1978). I interpret the case law to suggest that vacation pay is to be included in the computation of wages in the **tax year** in which it was received. Employer, however, urges me not to include the Vacation/Holiday Fund payment because it was not paid during the **year** (the 52 week period) preceding the injury. However, I note that it was paid and taxable in 2002, the same **tax year** in which the injury occurred, and for which Claimant's W-2 statements are in evidence and his AWW based upon. I thus find the $640 includible in Claimant's income for purposes of determining his AWW. I also note that Employer failed to consider that had Claimant worked as a longshoreman for a complete year prior to being injured, he would have received vacation pay in the 52 weeks preceding the injury. However, due to the injuries sustained, Claimant worked in the Longshore industry for less than a year.

Next, I note that EX-21 shows that Claimant began working as a longshoreman on Saturday, of the week ending June 9, 2002. June 9 was a Sunday. Therefore, Claimant began working as a longshoreman on June 8, 2002 and ceased working as such on the date of injury,

October 30, 2002. Thus, he worked as a longshoreman for 20 weeks and 4 days, or 20.57 weeks. I thus calculate Claimant's AWW by dividing his total income earned while a longshoreman, $19,553.56, by the number of weeks worked, 20.57, which yields an AWW of $950.59.

F. Medical Expenses

An employer who is held liable under the Act for compensation is also liable for all medical expenses resulting from the injury so long as they are reasonably and necessarily incurred. *Perez v. Sea-Land Services, Inc*., 8 BRBS 130 (1978). In addition, if the claimant sustains another injury that is a natural result of the primary injury, both injuries are compensable. *Cyr v. Crescent Wharf & Warehouse Co*., 211 F.2d 454, 457 (9th Cir. 1954).

Once a claimant has freely chosen a treating physician, he is authorized to change physicians only with the consent of Employer, the carrier or the District Director. 33 U.S.C. § 907(c)(2). However, the employer is obligated to give such consent if Claimant is seeking necessary and appropriate care from a specialist, where his first choice of physicians was not a specialist in that area. *Id.* Furthermore, "[c]hiropractic treatment is reimbursable only to the extent that it consists of manual manipulation of the spine to correct a subluxation shown by x-ray or clinical findings." 20 C.F.R. §702.404.

Employer concedes that it is liable for the payment of medical expenses to both Dr. Vichinsky and Dr. Dakkak, and contends it has paid all expenses due to these doctors. (Employer's Brief at 32-33). However, Employer contends it is not liable for chiropractic treatment administered by Dr. Weinberg, since treatment began without Employer's knowledge, the treating physician did not refer Claimant to Dr. Weinberg and Claimant did not request that Dr. Weinberg become his treating physician. (Employer's Brief at 33). To the contrary, Dr. Weinberg testified that his office requested on behalf of Claimant authorization to treat Claimant on either the date of Claimant's first visit to his office or the day after, but this authorization was denied. I find that the treatment administered by Dr. Weinberg was reasonable and necessary. In addition, Employer was obligated to authorize the treatment since Dr. Weinberg is a specialist in an area that Claimant's treating physician does not specialize in. Thus, Employer is liable for the medical treatment administered by Dr. Weinberg, but only in so far as it consisted of manual manipulation of the spine to treat subluxation.

Next, Employer contends that it is not liable for the treatment administered by Dr Lewis. (Employer's Brief at 33). Because I find that Claimant did not suffer a psychological injury as a result of the October 30, 2002 accident, Employer is not liable for such treatment.

Finally, Employer argues that Claimant failed to comply with § 7 of the Act with respect to the visit with Dr. Fleischer because Claimant did not seek authorization for this visit. (Employer's Brief at 34). I find no evidence to the contrary and Claimant has made no argument regarding the same. Therefore, again, I find that Employer is not liable for medical bills due to Dr. Fleischer.

ORDER

(1) Employer shall pay Claimant the following, to be computed based on an average weekly wage of $950.59 and an alternate earning capacity of $315 per week:

(a) Temporary total disability benefits from October 31, 2002 until December 29, 2004.

(b) Permanent partial disability benefits, according to the schedule, for a 17% loss of use of the right lower extremity.

(c) Temporary partial disability benefits, in relation to Claimant's back injury, for the period beginning December 30, 2004 and ending May 10, 2005, based on a wage earning capacity of $315 per week.

(d) Permanent partial disability benefits, in relation to Claimant's back injury, beginning May 11, 2005 and continuing, based on a wage earning capacity of $315 per week.

(2) Employer is entitled to a credit for any benefits already paid in relation to the injuries sustained as a result of the October 30, 2002 accident.

(3) Pursuant to § 7 of the Act, Employer shall pay all medical expenses consistent with this decision.

A

RALPH A. ROMANO
Administrative Law Judge

Cherry Hill, New Jersey